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Nos. 01-9094 & -9095

In The
Supreme Court of the United States

Abu-Ali Abdur'Rahman,

Petitioner,

v.

Ricky Bell,

Respondent.

FILED
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SUPREME COURT, U.S.

In re Abu-Ali Abdur'Rahman,

Petitioner.

PETITIONER'S SUPPLEMENTAL BRIEF

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INTRODUCTION

Petitioner Abu-Ali Abdur'Rahman ("Abdur'Rahman") respectfully files this Supplemental Brief to his Petition for a Writ of Certiorari (No. 01-9094) ("the Certiorari Petition") and Petition for an Original Writ of Habeas Corpus and For Other Extraordinary Relief (No. 01-9095) ("the Original Petition") in light of the oral argument in No. 01-400, *Bell* v. *Cone* (argued Mar. 25, 2002). Specifically, Petitioner files this Supplement to add as a further question presented:

> Whether the judgments in this case should be vacated and the case remanded for further consideration in light of No. 01-400, *Bell* v. *Cone*.

The Petition for a Writ of Certiorari seeks review of judgments issued on February 11, 2002 by the United States Court of Appeals for the Sixth Circuit. The ninety-day period to seek certiorari accordingly has not expired, and a supplemental brief is in order.[1]

The question raised by this Supplement, which relates to the performance of Petitioner's counsel in the capital sentencing proceedings, is properly before this Court. On federal habeas, the district court found a grievous failure by Petitioner's counsel to present *any* of the abundant available mitigating evidence at sentencing. See Pet. App. E3. A divided panel of the Sixth Circuit *sua sponte* reversed without briefing or argument (see *id.* F21) but stayed its mandate. Petitioner sought certiorari, including with respect to the question "[w]hether the panel majority's prejudice analysis was erroneous." Pet. i. Respondent opposed review principally on the ground that the case was fact-bound, and this Court denied certiorari (No. 00-1742, 122 S. Ct. 368 (2001)) and rehearing (No. 00-1742, 122 S. Ct. 661 (2001)). Petitioner immediately sought a further stay of the mandate in the Sixth Circuit and rehearing in that court. See Pet. App. H1-H27. After extended consideration, the court of appeals denied rehearing and issued its mandate. See *id.* B1-B2. Petitioner's Certiorari Petition (No. 01-9094) (including particularly Question 2) properly seeks review of the Sixth Circuit's order denying rehearing. See Cert. Pet. 1-2.

Even if this Court lacked jurisdiction to grant certiorari to review the court of appeals' specific Order denying rehearing after this Court's denial of certiorari, the further question raised by this Supplement would be properly presented. The denial of certiorari does not preclude Petitioner from raising the same issues in a later petition in the same case. STERN *ET AL.*, *supra*, § 4.18, at 198 (collecting cases). Thus, in his Petition for Certiorari from the Sixth Circuit's decision denying him relief under Rule 60(b), Petitioner may properly raise again the ineffective assistance of counsel question raised by his prior Petition for Certiorari.[2]

BACKGROUND

1. The district court in this case determined that Petitioner's trial counsel had been grossly ineffective at sentencing. Specifically, the district court – based on the extensive factual record compiled there – found that Petitioner had been grossly prejudiced by his counsel's failure to develop and introduce evidence regarding five different classes of mitigating evidence,[3] as well as the mitigating circumstances surrounding the prior homicide invoked by the prosecution as the principal aggravator supporting the death penalty. Pet. App. E47-E53. The district court emphasized that Petitioner's case was not one in which "counsel collected and put on the significant

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[1] Alternatively, this Supplemental Brief could be deemed a motion for leave to amend the petitions. When, as in this case, the ninety-day period to seek certiorari has not expired, this Court's practice has been to grant leave to amend liberally. See ROBERT L. STERN *ET AL.*, SUPREME COURT PRACTICE § 6.27, at 349 (7th ed. 1993); see also, *e.g.*, *Paradies* v. *United States*, 520 U.S. 1238 (1997) (granting leave to amend). No deadline, of course, applies to the Original Petition. The Original Petition (at 1-2) explains that it is filed "protectively" in the event this Court determines (i) that it lacks jurisdiction over the Certiorari Petition, or (ii) that Petitioner is not entitled to relief under the Certiorari Petition. Petitioner's addition of the question relating to *Bell* v. *Cone* to the Original Petition is similarly protective.

[2] Even if the question technically was not presented by the judgments before this Court, Petitioner would be entitled to relief pursuant to the Original Petition. See *supra* n.1.

[3] The district court found that jurors had been deprived of any evidence of: (i) the vicious abuse Petitioner suffered as a child; (ii) Petitioner's exceedingly dysfunctional upbringing as a result of his family's history of mental illness; (iii) Petitioner's own substantial mental illness; (iv) Petitioner's good character and contributions to society; and (v) the mitigating circumstances of the crime itself. Pet. App. E41-E56.

mitigating evidence and merely failed to get everything. This is a case of no mitigating evidence – none – being offered to the jury despite its availability and abundance. * * * This is not a case of harmless error." Pet. App. E56-E57.

The district court accordingly vacated Petitioner's death sentence and remanded for resentencing.

2. Respondent, recognizing that the district court's factual findings were unassailable, appealed only the district court's determination to develop a factual record. The Sixth Circuit *rejected* that argument. See Pet. App. F12, F15, F17. But two judges of the panel *sua sponte* and without any briefing or oral argument reversed the district court's factual determination that the grievous failures of Petitioner's counsel prejudiced him at sentencing. Ignoring the many issues raised by the district court's decision, the majority set forth its *entire* prejudice analysis as follows:

> Even considering the supplemental evidence heard by the district court and outlined in its opinion, Petitioner did not suffer prejudice at the sentencing phase due to his trial counsel's deficient performance. While it is true that much of the supplemental evidence contains mitigating evidence that a sentencer might find to be compelling, the same evidence likewise has aspects that would be compelling evidence of aggravating circumstances. In particular, the supplemental evidence contained a description of Petitioner's motive for killing a fellow prison inmate and a history of violent character traits. Therefore, we agree with the post-conviction trial court and the Tennessee Court of Appeals that because the mitigating evidence that could have been introduced also contained harmful information, Petitioner did not suffer prejudice sufficient to create a reasonable probability that the sentencing jury would have concluded that the balance of aggravating and mitigating factors did not warrant death.

Id. F21.

ARGUMENT

1. Subsequent to the filing of the instant Certiorari Petition and Original Petition on March 18, it has become apparent that the judgment in this case may be profoundly affected by this Court's decision in No. 01-400, *Bell* v. *Cone* (argued March 25). In light of the oral argument, it is apparent

that two possible outcomes in that case would merit a GVR Order here.[4] First, the Court could affirm the court of appeals' judgment that a presumption of prejudice applies when counsel fails to present any substantial arguments at sentencing. Second, the Court could explicate the proper inquiry for adjudicating claims of prejudice from ineffective assistance at capital sentencing.

In either circumstance, further consideration of this case by the court of appeals would be warranted. Here, as in *Mickens* v. *Taylor* (No. 00-9285, decided Mar. 27, 2002), the district court's factual determinations, made after "an evidentiary hearing" and reflected in "a thorough opinion," turn on important "credibility judgments." Slip op. at 1 (Kennedy, J., concurring). The district court made extensive and specific findings regarding the extent to which Petitioner's trial counsel had been ineffective at sentencing (Pet. App. E37-E54), as well as the effect that the "abundant" mitigating evidence not presented at trial would have had on the jury (*id.* E54-E57). In light of the district court's findings, it is uncontested that Petitioner's state trial counsel had not made a strategic choice that they would not investigate possibly mitigating evidence or present witnesses, but – as the counsel themselves acknowledged to the district court – simply failed to do so. *Id.* E42-E43. As the district court found, the pretrial investigation by Petitioner's counsel was "wholly inadequate" insofar as they

- failed to obtain files regarding Petitioner's case from the attorney who had previously represented Petitioner, even though that attorney had "suggested that [Petitioner's counsel] do so" (Pet. App. E40);
- "failed to request Petitioner's extensive mental health records, or his educational, prison, or military records" (*id.*);
- failed to respond to a request from state mental health institute for background information to be used in its psychiatric evaluation of Petitioner (*id.*);
- failed to file (notwithstanding that they had drafted) a motion requesting that the state trial

[4] It is not possible to cite specific exchanges from the oral argument because a transcript is not yet available.

court declare Petitioner indigent and approve funds for investigative or expert services (*id.* E41);

- failed to "consult or hire a mental health expert to perform an independent mental evaluation of [Petitioner]" (*id.*);
- failed to introduce *any* of the information from the state mental health institute's records regarding Petitioner's background or mental health history (*id.*);
- failed to investigate the nature of Petitioner's prior convictions (*id.* E42); and
- failed to contact Petitioner's brother, half-sister, or former fiancée, much less arrange for them to testify at sentencing (*id.* E41-E42).

Further, the district court determined that witnesses such as Petitioner's sister and former fiancée, both of whom testified at Petitioner's federal habeas hearing, and who would have been available to testify at Petitioner's trial, were "extremely credible" and would have presented "compelling" testimony. Pet. App. E47, E51-52. The district court acknowledged that "there was also a considerable amount of negative evidence" – including aspects of Petitioner's criminal, mental health, and educational records – "that the prosecution could have introduced during the sentencing hearing" to rebut the mitigating evidence that constitutionally effective counsel would have introduced. *Id.* E55-E56. Despite the existence of this potentially negative evidence, however, the district court concluded that Petitioner had nonetheless been prejudiced by his counsel's failure to introduce mitigating evidence: "[T]he court is persuaded that had counsel presented the other evidence of Petitioner's background and mental history, there is more than a reasonable probability that at least one juror would have voted for a life sentence rather than the death penalty." *Id.* E56.

Thus, the circumstances of Petitioner's case contrast markedly with those of *Bell* v. *Cone*, in which respondent's trial counsel failed to present any direct mitigating evidence at sentencing but credibly explained that he had done so for strategic reasons. First, Cone's trial counsel had presented, and the jury was charged to consider during its sentencing deliberations, mitigating evidence during the guilt phase, 243 F.3d 961, 978 (CA6 2001), as part of Cone's insanity defense (No. 01-400, State

Br. 4). This mitigating evidence included testimony by two expert witnesses: a clinical psychologist, who testified that Cone suffered from both a substance-abuse disorder and a post-traumatic stress disorder (*id.*), and a neuropharmacologist, who testified regarding Cone's history of drug abuse (*id.* 5). During the guilt phase, the jury also heard testimony from Cone's mother regarding the effect on Cone of his service in Vietnam. *Id.* 5.

During his opening statement at sentencing, Cone's trial counsel specifically argued that the mitigating evidence presented during the guilt phase supported the application of three statutory mitigating circumstances and non-statutory mitigating factors. No. 01-400, State Br. 7. Further, although he did not directly present any evidence during the sentencing phase, Cone's counsel did manage – during the cross-examination of a witness for the state – to elicit testimony that Cone had been awarded a Bronze Star while serving in the U.S. Army. *Id.* 8.[5] Unlike Petitioner's case, in which his trial counsel's pretrial investigation was "wholly inadequate" (Pet. App. E40), in *Cone*,

> the Tennessee Court of Criminal Appeals specifically found that Cone's trial counsel had
> made a diligent and thorough investigation of the facts and the law. Although the appellant was without funds, trial counsel was able to procure a defense team composed of himself, a research expert, medical experts, and an investigator. No stone was left unturned in the preparation of the appellant's defense. Trial counsel was very conscientious in representing the appellant and placed much thought and effort into the tactical aspects of this case.

Id. 12.

Further, in this case, the district court's thorough evaluation of the extent to which Petitioner's trial counsel was ineffective, and the consequence of that ineffective assistance on Petitioner's sentence, stands in sharp contrast to the court of appeals' subsequent evaluation of the same issue. The district court properly emphasized the importance of "a broad inquiry into all relevant mitigating

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[5] Thus, regardless of the wisdom of the decision by Cone's trial counsel not to present direct mitigating evidence during sentencing, Cone's case – unlike that of Petitioner – was *not* a case in which "no mitigating evidence * * * [was] offered to the jury." Pet. App. E56.

evidence to allow an individualized determination" of the appropriateness of the death penalty. Pet. App. E45-E46. Thus, to determine whether Petitioner had been prejudiced at sentencing, the district court considered numerous factors, including – in some detail – all of the "abundant" mitigating evidence that was not presented at Petitioner's trial. *Id.* E47-E53. Based on this evidence, the district court concluded that, even when the potentially "negative" aspects of that evidence were taken into account, Petitioner had been prejudiced by the ineffective assistance of his counsel at sentencing: "It only takes one juror to decide that the mitigation evidence presented by the Petitioner outweighs the aggravating circumstances established by the prosecution." *Id.* E56.

Unlike the district court, however, the Sixth Circuit majority's discussion of the prejudice that accrued from the failure of Petitioner's trial counsel to present mitigating evidence – again, an issue that the panel majority raised *sua sponte* – was, at best, cursory. The majority eschewed any analysis of the "abundant" mitigating evidence, much less the constitutional requirement, emphasized by the district court, that a sentencer conduct a broad inquiry into *all* relevant mitigating evidence (Pet. App. E45-E46). Rather, the panel majority reasoned only that Petitioner had not been prejudiced because the mitigating evidence on which district court relied "seem[ed] to merely supplement the factual findings made by the post-conviction trial court" and, discussed above, also contained "harmful information." *Id.* F21.

2. A remand in this case for further consideration in light of *Bell* v. *Cone* would, for the time being, obviate the need for review of the two questions presented by the Certiorari Petition prior to this Supplement (which relate to the promulgation of Tennessee Supreme Court Rule 39). A determination by the Sixth Circuit based on *Bell* that Petitioner was in fact prejudiced in sentencing would reinstate the district court's order remanding this case to the state courts for resentencing. If the court of appeals instead adheres to its prejudice determination, Petitioner would be entitled to seek certiorari once again as to the questions relating to TN Rule 39.

3. This Court's prudential decision to deny Petitioner's previous Petition for Certiorari does not, of course, militate against holding this case and, if appropriate, remanding to the court of appeals in light of *Bell* v. *Cone*. This Court "must lay down rules that can be followed in the innumerable cases we are unable to review" (*Mickens* v. *Taylor*, *supra*, Slip op. at 4 n.1), and it consistently vacates and remands cases that would not otherwise merit plenary review.

CONCLUSION

For the foregoing reasons, this case should be held pending the disposition of No. 01-400, *Bell* v. *Cone*. In the event the Court's decision in *Bell* warrants a remand in this case, the Court should enter an Order to that effect. If no remand is warranted, the Certiorari Petition should be granted as to the first two questions it presents.

Respectfully submitted,

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